

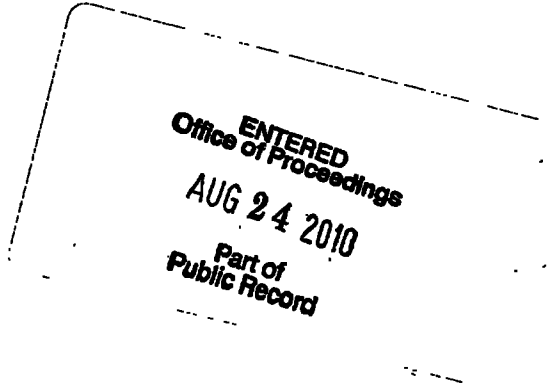
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E-Filing

August 24, 2010

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001



**RE: Finance Docket No. 35380, San Luis & Rio Grande Railroad
Petition for a Declaratory Order**

Dear Ms. Brown:

On behalf of the San Luis & Rio Grande Railroad, I am e-filing its opening statement of evidence and argument in the above captioned proceeding. This statement due August 27, 2010, is being filed early, today August 24.

Please contact either me or James Savage at 202-296-3333 if you have any questions.

Sincerely yours,


John D. Heffner

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35380

**SAN LUIS & RIO GRANDE RAILROAD
PETITION FOR A DECLARATORY ORDER**

OPENING STATEMENT AND ARGUMENT

Submitted by
John D. Heffner
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Due: August 24, 2010

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35380

**SAN LUIS & RIO GRANDE RAILROAD
PETITION FOR A DECLARATORY ORDER**

OPENING STATEMENT AND ARGUMENT

INTRODUCTION

On August 12, 2010, the Board served a decision¹ instituting a declaratory relief proceeding as requested by Petitioner San Luis & Rio Grande Railroad ("SLRG") in its Petition filed May 25, 2010. The Board set August 27, 2010, as the deadline for SLRG's opening statement and argument, September 27, 2010, as the due date for public comments, and October 12, 2010, as the deadline for SLRG's reply to those comments.

Briefly, this proceeding presents the issue of whether the I.C.C. Termination Act ("the ICCTA" or simply "the Act") preempts the application of the land use code of Conejos County, CO, to SLRG's ownership and operation of a containerized truck-to-railroad solid waste transload facility located at Antonito,

¹ Hereafter cited as "the Board's Decision" or just "the Decision."

Conejos County, CO, that will be used to handle contaminated dirt.² The Board's Decision advises that filings should focus on whether the sealed containers used to transport the dirt are "original shipping containers" under the Clean Railroads Act ("CRA") amendment to the ICCTA at 49 U.S.C. 10908(e)(1)(H)(i) and whether the dirt that will be transported is subject to the CRA. SLRG contends that the CRA does not apply to this facility because the sealed containers constitute "original shipping containers" within the meaning of that law and the dirt is neither "Industrial waste" nor "Institutional waste." Moreover, the operation of SLRG's Antonito transload facility meets the Board's test for preemption in cases such as The City of Alexandria, Virginia-Petition for Declaratory Order, STB Finance Docket No. 35157, STB slip op. served February 17, 2009 (City of Alexandria), and the recent case of Borough of Riverdale-Petition for Declaratory Order, STB Finance Docket No. 35299, STB served Aug. 5, 2010 (Borough of Riverdale).

In support of its position that the CRA does not apply to this transportation, SLRG submits evidence in the form of a verified statement by shipper witness Bret Rogers, Senior Vice President of the Technical Services division of EnergySolutions ("ES"), a fact sheet issued by the United States Department of Energy ("DOE"), and a letter from Deputy Administrator Donald Cook with

² More specifically, this commodity is known as class 7 and class 9 hazardous waste. Materials transported to the transload facility and shipped by rail shall be limited to DOT criteria designation Class 7, 9, or Unregulated and which meets NRC classification as Low Level Class A waste. These materials consist of dirt, wood, metal from old conventional explosive tests as well as some very low levels of depleted uranium and PCB's (polychlorinated Biphenyls).

DOE's National Nuclear Security Administration describing the transloading operation.³ In support of its position that the transload facility meets the Board's test for preemption, SLRG submits a verified statement by its General Manager Mathew Abbey⁴ describing in detail the operation of that facility.

FACTUAL BACKGROUND

This proceeding dates back to the Spring of 2009 when SLRG and ES sought to develop a containerized truck-to-railroad solid waste transload facility for moving contaminated dirt from DOE's Los Alamos National Laboratory ("LANL") in New Mexico to its final destination at Clive, UT. More specifically, ES seeks to truck the dirt from DOE's facility to Antonito where SLRG would transfer the freight from trucks to waiting rail cars utilizing the services of its agent, Alcon, Inc. ("Alcon"). ES executed a transportation agreement under 49 U.S.C. 10709 with the Union Pacific Railroad ("UP") to move the freight to its ultimate destination at Clive. Inasmuch as UP does not serve Antonito, SLRG would handle the rail movement from Antonito to the UP interchange at Walsenburg, CO.

ES and SLRG originally began discussions with Conejos County ("the County") officials in 2009 regarding the proposed transportation. SLRG agreed to postpone its use of the facility after objections from County officials. SLRG then

³ Attached as Exhibits 1, 2, and 3, respectively.

⁴ Attached as Exhibit 4.

engaged County citizens and officials in discussions to persuade them that operation of the facility would not pose any sort of safety or health hazard to local citizens. In response, County officials demanded that SLRG and ES seek a permit prior to construction for a land use change under Article 5, Division 5.1, section 5.100 of the County's Land Use Code, a construction permit under that provision, and a Special Use Permit. Aside from the substantial time and administrative processes that might be required for the railroad to obtain these permits, County officials informed SLRG that the County had a moratorium in effect until May 25, 2010, before SLRG could even apply for such permits. County officials further informed both SLRG and ES officials that obtaining such permits would require public hearings and could take an indefinite amount of time.

SLRG took the position that its actions in owning and operating the facility were exempt from the County's requirements under the preemption provisions of 49 U.S.C. 10501(b). The County responded by claiming that the facility was not exempt from local law under federal preemption. Eventually the parties, including ES, SLRG, and the County agreed to meet in an attempt to settle their differences. Towards that end, the parties met several times and arrived at what SLRG, ES, and several County officials thought was the basis for a mutually acceptable settlement agreement. In exchange for numerous concessions by SLRG, that agreement would have permitted SLRG to initiate transload operations at the facility on or

about May 25, 2010, without the need to comply with the Land Use Code or any County permitting requirements. The final draft of the settlement agreement was presented to the County Commissioners for approval in principle at an open meeting and hearing on Wednesday evening May 19, 2010. After considerable debate and intense citizen opposition, the Commissioners declined to approve the proposed settlement and against the advice of the County Attorney directed him to go to local court to seek an injunction against the railroad for conducting the proposed transload operation.

The County initiated litigation against SLRG in Conejos County District Court on May 24, 2010, seeking both a preliminary and a permanent injunction. Additionally, some individuals initiated litigation against the railroad *pro se* in the District Court as well. SLRG then filed this Petition on May 25, 2010. No party filed any response to SLRG's Petition.

The County alleged, *inter alia*, that section 1, Division 1, Section 5.100 of the Land Use Code requires a Land Use Permit for any change in use of land, that no development or activity can occur prior to the issuance of same, and that SLRG has changed the use of the facility without applying for a Special Use Review and obtaining a Land Use Permit. The County also alleged that the Land Use code requires a construction permit for all new construction and that SLRG has constructed a building or other structures on its property without obtaining a

construction permit. The County further alleged that Article 4, Section 4.200 of the Land Use Code requires that all structures conform to the water and wastewater requirements of Article 13 of the Land Use Code, that SLRG's structures do not conform with those provisions, and that SLRG has been advised by the County that its must comply with those requirements prior to using the facility. Finally, the County alleged that section 30-28-124 of the Colorado Revised Statutes forbids the construction of any building or structure in violation of a zoning code and that it is unlawful to use any building, structure, or land in violation of a zoning code.⁵

After SLRG removed the litigation to federal court in Denver, the Conejos County District Court dismissed all proceedings. The parties continued to meet and talk but without reaching any sort of settlement. Then on July 15, 2010, and without prior notice to SLRG, the County voluntarily dismissed its federal court proceeding against SLRG. Although that would appear to end this case or controversy, SLRG believes that considerable citizen opposition continues to exist and that the County and/or its citizens would likely reinstitute litigation to block this project at any time. In any event, SLRG requests that the Board render a decision to remove uncertainty as to the scope of federal preemption. Borough of Riverdale, supra, at 4.

⁵ See, County complaint, sections 8-14, 18, and 19, submitted with SLRG's Petition.

ARGUMENT

This proceeding presents two basic issues: (1) does the transportation involved here fall under the CRA's provisions either requiring SLRG to comply with the County's land use codes or to seek Board authority to construct and operate a transload facility under the STB's Solid Waste Rail Transfer Facility interim regulations⁶ and (2) does SLRG's operation of its transload facility preempt the application of County licensing laws. SLRG contends the answers to these questions are (1) no and (2) yes.

A. The Clean Railroads Act Does Not Apply To SLRG's Antonito Transload Facility

The key to determining whether or not the CRA applies is whether the sealed containers used for shipping the dirt constitute "original shipping containers" under that law. If the Board concludes that these containers are "original shipping containers," as SLRG contends they are, that part of this proceeding is over. The only remaining question then is whether SLRG has complied with the Board's preemption precedent in operating the Antonito transload facility with the result that local permitting laws do not apply.

Unfortunately, neither the statute, the Board's Solid Waste interim regulations, nor the limited case law provide *any* guidance as to what is an "original shipping container." Neither SLRG nor ES, a company which specializes

⁶ 49 CFR 1155

in the haulage and handling of waste materials, knows of any other statute or regulation defining this term. Accordingly, SLRG has reviewed the sparse legislative history behind the CRA to divine the meaning of this term.

The CRA had its origins with an amendment that Senator Frank Lautenberg of New Jersey had originally submitted back in 2007 but died in Committee.⁷

Senator Lautenberg renewed his efforts in 2008 and the provision was enacted into law as 49 U.S.C. 10908-10909 as part of the Railroad Safety Enforcement Act of 2007, S1889. The Senate Report provides,

“A solid waste rail transfer facility would only include the portion of a facility owned or operated by or on behalf of a railroad carrier where solid waste, as a commodity to be transported in commerce, is collected, stored, separated, processed, treated, managed, disposed of, *or transferred outside of original sealed shipping containers* [emphasis supplied]. It would not include a facility to the extent that activities taking place at such a facility were comprised of the railroad transportation of solid waste after the solid waste is placed on or in a railroad car, including transportation for the purpose of interchanging railroad cars containing sealed solid waste shipments.” S. Report 110-270 at 37-8.

Although this language still does not completely address the situation posed here, whether sealed containers are “original shipping containers,” a review of comments by Senator Lautenberg⁸ as well as Congressional intent clearly shows that Congress did not intend to use this law to deny preemption to the activities at the Antonito transload facility. Rather what Congress sought to prevent was the

⁷ The Clean Railroads Act of 2007, S2371.

⁸ Attached as Exhibit 5.

practice of nonrailroad entities operating landfills and waste transfer facilities establishing themselves as railroad common carriers so as to use preemption to evade state or local permitting requirements. Solid Waste Rail Transfer Facilities, STB docket No. Ex Parte No. 684, slip op. STB served Jan. 14, 2009 at 2; Northeast Interchange Railway LLC – Lease and Operation Exemption – Line in Croton-on-Hudson, NY, STB Finance Docket No. 34734, STB served Nov. 18, 2005; New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Railway-Construction, Acquisition, and Operation Exemption-In Wilmington and Woburn, MA, STB Finance Docket No. 34797, slip op. served July 10, 2007 (New England Transrail, supra). Moreover, the amendment was a response to egregious actions of several New Jersey-based short lines operating open air waste transfer facilities containing huge piles of hazardous and/or inflammable waste matter. See, e.g., N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238 (3d Cir. 2007).

As the verified statement of Mathew Abbey shows, neither SLRG nor its agent, Alcon, collects, stores, separates, processes, treats, manages, or disposes of the incoming dirt. The freight arrives in sealed containers by truck. After the trucks are logged in and inspected, Alcon simply uses a crane to lift the containers out of the trucks and onto waiting gondola cars where they are covered with a hard fiber glass lid and assembled into a train for movement in interstate commerce. At

no point does SLRG or Alcon open these containers. Abbey VS at paras. 13 and 15.

Regarding the nature of the containers, SLRG directs the board's attention to both the testimony of Bret Rogers and the DOE fact sheet. Specifically, Mr. Rogers states that "these containers are designed, constructed, tested, and used to comply with U.S. Department of Transportation requirements for shipping radioactive waste and they must be designed and constructed to prevent the release of waste material during transportation. Each container is secured after the waste is packaged and is not reopened until reaching its final destination at Clive, UT. He notes specifically that the original shipping containers are not reopened at any time during transportation or at the transload facility. Even DOE characterizes these shipments as moving in "containers." See, the letter from Donald L. Cook, Deputy Administrator for Defense Programs to the Honorable John T. Salazar dated July 9, 2010, attached here as Exhibit 3. For example, paragraph two of the letter states "[w]e understand that EnergySolutions had voluntarily suspended the practice of loading DOE waste containers onto rail cars..." DOE's letter contains no fewer than five references to the dirt moving in containers. At page three Mr. Cook states "[w]e are informed by EnergySolutions that no waste containers are opened during the transload process; rather, sealed and intact containers are transferred by crane from truck to railcar." The DOE fact sheet submitted as

Exhibit 2 notes that the dirt is shipped in water resistant containers that it identifies as "certified, IP-1 Soft-Sided Shipping Containers" and, in some cases, in metal intermodal containers used for larger debris. DOE states that upon arrival at the transload facility a crane lifts the containers from the trucks and places them in high-sided rail cars. It adds that at no point are the containers staged directly on the ground.

The transload services proposed here are consistent with Congressional intent that local permitting laws do not apply. As Senator Lautenberg himself has stated, "[l]et me be clear that my concern is not the transport of solid waste by rail... [f]urther the transportation of waste via rail is not at issue here, and I am not opposed to the operation of solid waste management facilities on property owned or controlled by railroads...My chief concern is the lawful management of solid waste facilities..." Remarks of Senator Lautenberg re S. 719, a bill to amend 49 U.S.C. 10501 to exclude solid waste disposal from STB jurisdiction attached here as Exhibit 5.

But even if the Board were to conclude contrary to all of this evidence that the sealed containers or containers in which the dirt moves are not "original shipping containers," the freight does not meet the definition of waste products subject to the CRA. In that regard, the law contains a series of definitions of commodities subject to its provisions.

LANL was founded in 1943 as part of the Manhattan Project, which was to develop the first atomic weapon. During this time, the disposal of hazardous chemical and radioactive wastes was not regulated and, therefore, some of these materials were disposed of improperly.

LANL's environmental risk reduction programs seek to remedy environmental problems caused by 50 years of LANL operations by bringing together multi-disciplinary, world-class science, engineering, and state-of-the-art management practices. The goals are to protect human health and the environment from exposure to hazardous, radioactive, and mixed wastes from past treatment, storage, and disposal practices and meet the environmental clean-up requirements of LANL's permit to operate hazardous waste facilities.

Some of the Low-Level Radioactive Waste ("LLRW") generated from the site restoration projects is packaged at the LANL site and shipped to disposal facilities such as ES' facility located in Clive, Utah.

The federal regulation governing the disposal of radioactive waste is primarily contained in 10 CFR 61, "Licensing Requirements for Land Disposal of Radioactive Waste". This regulation defines LLRW as "radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in paragraphs (2), (3), and (4) of the definition of

Byproduct material set forth in § 20.1003 of this chapter.” (Reference 10 CFR 61.2).

Clearly, contaminated dirt generated at the Los Alamos facility is not Commercial and retail waste, Construction and demolition debris, Household waste, Municipal solid waste, or Sludge as those terms are defined in section 10908(e). SLRG submits it is neither Industrial waste nor Institutional waste as well. It is not “Industrial waste”⁹ because it is not generated from any sort of manufacturing, industrial, research, or development processes or operations. Rather it is LLRW produced by the Los Alamos National Laboratory as part of their site restoration requirements. Similarly, it is not “Institutional waste.”¹⁰ It is not generated by schools, hospitals or by nonmanufacturing activities at prison or other government facilities as explained above. Accordingly, the contaminated dirt at issue here is not a commodity subject to the CRA.

**B. SLRG’s transload operation satisfies
the Board’s preemption requirements**

⁹ Section 10908(e) defines Industrial waste as the solid waste generated by manufacturing and industrial and research and development processes and operations, including contaminated soil, nonhazardous oil spill cleanup waste and dry nonhazardous pesticides and Chemical waste, but does not include hazardous waste regulated under subtitle C of the Solid Waste Disposal Act, mining or oil and gas waste.

¹⁰ Section 10908(e) defines Institutional waste as material discarded by schools, nonmedical waste discarded by hospitals, material discarded by nonmanufacturing activities at prisons and government facilities, and material discarded by other similar establishments or facilities.

SLRG asserted in its Petition that the proposed transload arrangement met the Board's requirements for preemption under 49 U.S.C. 10501(b). The fact that SLRG has chosen to have a subcontractor, Alcon, operate the facility instead of operating it directly does not change the result mandated by Green Mountain Railroad Corporation v. Vermont, 404 F.3d 638 (2d Cir. 2005)(Green Mountain) and cases cited and discussed therein. See, The City of Alexandria, supra (holding that the railroad's use of a subcontractor to operate its transload facility is still entitled to preemption against the application of local permitting laws).

Under section 10501(b), "the jurisdiction of the [Surface Transportation] Board over transportation by rail carriers and remedies provided under the [ICCTA] is exclusive and preempts the remedies provided under Federal or State law." Simply stated, section 10501(b) applicable to all common carrier railroad operations including those of SLRG at the facility preempts the application of inconsistent state or local laws or regulations. There is ample precedent holding that section 10501(b) preempts state or local permit or preconstruction requirements including environmental and zoning requirements for railroad transloading facilities. See, SLRG submits that the Green Mountain case is directly on point and bars the County from enforcing its land use regulations against the railroad. Those preempted here include Section 30-28-124, C.R.S., Article 16 of the Conejos County, Land Use Code, Article 5, Division 5.1, Section

5.100 of the Land Use Code, Article 4, Section 4.200 of the Land Use Code, and Article 13 of the Land Use Code. These provisions are preempted because they would forbid SLRG from conducting common carrier railroad operations in the form of transloading and hauling in interstate commerce containerized contaminated dirt from Antonito, CO, to Clive, UT. They act as a prior restraint on SLRG's operating authority granted by this Board in 2003 and SLRG's use of its facility.

Case precedent holds that in order for the Board to find preemption over local laws two elements must be present. First, the service sought to be regulated or forbidden at the local level must entail transportation and, second, that transportation must be performed under the auspices of a rail carrier. New England Transrail, supra at 9-10. Unquestionably, both elements of this test are met here. The movement of containerized contaminated dirt in interstate commerce from its origin about one hundred miles from Antonito to its destination at Clive, UT, is undoubtedly transportation. Moreover, the ownership, operation, and use of SLRG's facility at Antonito qualifies for "transportation" under 49 U.S.C. 10102(9) which defines it as "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail," and

“services related to that movement, including receipt, delivery, . . . transfer in transit, . . . storage, handling, and interchange of passengers and property.”

The ICCTA defines the term “transportation” broadly to encompass not only rail lines but ancillary facilities used for and services related to the movement of property by rail, expressly including “receipt, delivery,” “transfer in transit,” “storage,” and “handling” of property. 49 U.S.C. 10102(9). Thus, as the Board has held “transportation” is not limited to the movement of a commodity while it is in a rail car, but includes such integrally related activities as loading and unloading material from rail cars and temporary storage. Accordingly, the courts and the rail industry have consistently understood that transloading operations are part of rail transportation. For us to attempt to suggest otherwise here could have far-reaching, disruptive implications for a host of other commodities (such as lumber, cement, brick, stone and automobiles) for which rail carriers often perform transloading at the starting or ending point of the rail component of the movement.” New England Transrail, supra, at 2.

The second part of the requirement is also met. There is no question that SLRG is a “rail carrier” which is defined as a “person providing transportation for compensation” as SLRG was authorized by the Board to acquire and operate about

149 miles of railroad track back in 2003.¹¹ Since then, SLRG has been active in moving a diverse mix of commodities over its lines.

Since SLRG filed its Petition in late May, the Board has issued a second decision reaffirming that a railroad's use of an agent to handle transloading does not deprive it or its transload facility of preemption from conflicting local laws. Borough of Riverdale, supra, involved a challenge by the Borough to a transload operation developed by the New York Susquehanna & Western Railway ("NYS&W") to serve its customer, Tri-State Brick, Inc., utilizing an NYS&W subsidiary to perform the transload operations. The Board carefully analyzed the NYS&W transload operation and concluded that it qualified for preemption under prior precedent including that in City of Alexandria, supra (finding preemption) and Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order (Town of Babylon), FD 35057 (STB served Feb. 1, 2008 & Sept. 26, 2008) (finding no preemption where it was the independent transload operator and not the rail carrier that had an exclusive right to conduct transloading and had exclusive responsibility to construct and maintain facilities and to market and bill the public for services).

¹¹ San Luis & Rio Grande Railroad Company—Acquisition and Operation Exemption—Union Pacific Railroad Company, STB Finance Docket No. 34352, decision served July 18, 2003.

Here SLRG deliberately modeled its arrangements for operating the facility after those employed by Norfolk Southern Railroad ("NS") in operating its ethanol transload facility in City of Alexandria, supra. But, as Mathew Abbey's statement and the Alcon agreement attached to his statement clearly show, the SLRG transload arrangement using the services of Alcon as its agent-contractor satisfies Board precedent.

In Borough of Riverdale,¹² The Board cited the following as indicative of an arrangement satisfying its criteria qualifying for preemption:

1. whether the rail carrier owns the transloading facility;
2. whether the rail carrier has paid for the construction and operation of the facility;
3. whether the rail carrier holds out transloading as part of its service;
4. whether the third-party loader is compensated by the carrier or the shipper;
5. the degree of control retained by the carrier over the third party; and
6. and the other terms of the contract between the carrier and the third party.

Examining the arrangement between SLRG and Alcon, the Board will find as follows. SLRG owns the transload facility. Abbey VS, para. 3. SLRG paid for the construction and operation of the facility. Id. SLRG offers the transloading

¹² At 5.

services as part of its rail transportation services. Id. Alcon neither owns nor leases the facility and pays no fees or other consideration for the use of the facility and has no right to market the facility or conduct any independent business there. Abbey VS, paras. 3,7, and 8. SLRG compensates Alcon for its transloading services. Abbey VS, para. 8. SLRG is totally in control of the arrangements between it and Alcon. For example, SLRG has the exclusive right to market the facility, contract with shippers, and set rates and charges. Only SLRG can collect fees from customers for the use of this facility. Abbey VS, paras. 3 and 8. Alcon's activities there are totally subject to SLRG's control including over such matters as safety, environmental, security, and operational aspects of the facility, the physical equipment located there, and access to the facility. Alcon does not take any operational directions from the shipper and is not liable to the shipper for damage. Abbey VS, paras. 10-13 and 16. Furthermore, SLRG provides such training as may be required for Alcon employees but Alcon exercises no supervisory control over SLRG employees. Abbey VS, paras. 18 and 19.

The Board will note in comparing the SLRG/Alcon arrangements with those cited in City of Alexandria, SLRG's contractor will handle the movement and unloading of sealed containers from trucks onto rail cars, monitor and direct the movement of incoming trucks and handle any associated paper work, and function as SLRG's agent, under its supervision and direction. Alcon agreement paras. 2,

and 3. Like NS' contractor, Alcon will have no right to market services to ES or any other customer that might eventually be served at the Facility and SLRG will have total responsibility for marketing. Alcon agreement paras. 5 and 11. Like NS, SLRG will be totally and wholly responsible for all costs, liabilities, and expenses associated with the facility including maintenance, repair, operation, and taxes as well as for any loss or damage claims related to the freight movement, will have complete control and responsibility over the facility for any purpose including safety, security, and compliance with local and federal laws, and will retain the ability and sole discretion to terminate that agreement without cause and to provide those services directly or through a new subcontractor. Alcon agreement at paras. 9 and 12-14; City of Alexandria, supra, at 3-5.

Putting this proceeding in the greater context of the nation's rail transportation policy goals, a finding of preemption will further those objectives. According to the letter from DOE Deputy Administrator Cook to Congressman Salazar, the waste currently moves by truck incurring over 625,000 road miles that otherwise could have been avoided had rail transportation been utilized. Some of these routes would have involved the use of roads in southwestern Colorado. Mr. Cook notes that rail is the safest mode for transporting this traffic inasmuch as truck transportation statistically involves *twenty times* more transportation incidents (accidents not involving radiological releases) compared to rail incidents

for the same per ton-miles. Safety aside, rail transportation is twice as efficient from the perspective of fuel consumption. Cook letter, Exhibit 3. Finally, rail transportation is environmentally superior to truck transportation and will not result in highway congestion on two lane rural roads.

CONCLUSION

Accordingly, SLRG has met the Board's test for preemption. SLRG requests the Board issue a decision finding that section 1, Division 1, Section 5.100 of the Land Use Code requiring a Land Use Permit for any change in use of land, that Article 4, Section 4.200 of the Land Use Code requiring that all structures conform to the water and wastewater requirements of Article 13 of the Land Use Code, and that section 30-28-124 of the Colorado Revised Statutes forbidding the construction of any building or structure in violation of a zoning code and finding it unlawful to use any building, structure, or land in violation of a zoning code are all preempted.

Respectfully submitted,



John D. Heffner
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-3334

Dated: August 24, 2010

CERTIFICATE OF SERVICE

I, John D. Heffner, do hereby certify that a copy of the Opening Statement of San Luis & Rio Grande Railroad was sent by electronic mail and by first class United States mail, postage prepaid, to Steven Atencio, Attorney for Conejos County, CO, this 24th day of August 2010.

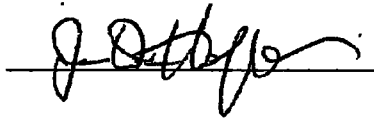
A handwritten signature in black ink, appearing to read "J. D. Heffner", is written over a horizontal line.

EXHIBIT 1.



Sworn Statement

August 24, 2010

John D. Heffner via Email (j.heffner@verizon.net)

John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006

Subject: Sworn Statement Regarding the Transload Facility in Conejos County Colorado

Dear Mr. Heffner,

EnergySolutions has been asked to provide a written sworn statement regarding the proposed truck-to-rail transload facility located in Conejos County Colorado. Specifically, this letter documents the proposed operation and the relationship between EnergySolutions, the U.S. Department of Energy (DOE), and the San Luis and Rio Grande Railroad (SLRG).

I, Bret Rogers, am the Sr. Vice President of our Technical Services division at EnergySolutions and am over the age of 18. EnergySolutions mission is to protect the public and environment by managing radioactive waste from various contaminated sites throughout the country and providing safe disposal of the waste at our licensed disposal facility in Clive, Utah. I have been employed by EnergySolutions since 1999. My current responsibilities include supporting our customers with waste management services such as waste characterization, packaging, transportation, treatment, and disposal.

EnergySolutions is contracted by the DOE to provide packaging, transportation, and disposal services for Los Alamos National Laboratory (LANL) located in Los Alamos, New Mexico. LANL is working under a Consent Order issued by the State of New Mexico to restore several contaminated areas by 2015. Waste generated as a result of these restoration activities includes primarily contaminated soil and debris.

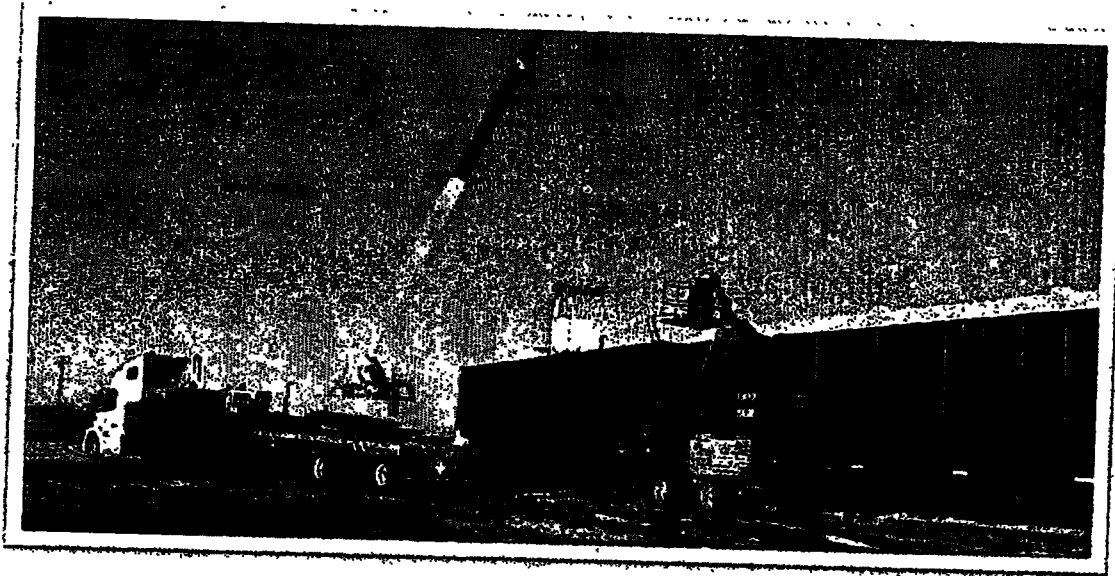
EnergySolutions provides containers to LANL for packaging the soil and debris. These containers are designed, constructed, tested, and used to comply with the U.S. Department of Transportation (DOT) requirements for shipping radioactive waste in accordance with 49 CFR 173. Specifically, these containers must be designed and constructed to prevent the release of waste material during transportation. Each container is sealed after the waste is packaged and is not opened until reaching its final destination at the disposal facility in Clive, Utah. Each shipment is certified by a qualified shipper to comply with applicable DOT regulations.

The following information details the packaging and transportation operation specifically for the LANL remediation project and the truck-to-rail transload facility located in Conejos County, Colorado.

ENERGYSOLUTIONS

DOE is the generator of record for the waste material being shipped from the DOE LANL site in Los Alamos, New Mexico. DOE's onsite contractor is responsible to characterize the excavated waste material and prepare it for packaging. Once the material is packaged into shipping containers that comply with all applicable DOT regulations, the container is closed and sealed to prevent release of the waste material until the waste is received at the disposal facility in Clive, Utah. Onsite personnel then inspect and survey the containers with radiation detection instruments to ensure compliance with DOT shipping requirements. The containers are then loaded onto a truck trailer to be shipped to the transload facility in Conejos County, Colorado. The original shipping containers are not re-opened at any time during transportation or at the transload facility.

Upon arrival at the transload facility, the original shipping containers are then directly loaded from the truck into railcars as shown below. The railcars are equipped with a hard fiberglass lid which is secured after the containers are loaded from the truck into the railcar. At no time are the original shipping containers opened. The railcar is then billed to the railroad for delivery to the Clive, Utah disposal facility.



EnergySolutions licensed disposal facility is served by the Union Pacific Railroad. The disposal facility is equipped with over 10 miles of onsite rail track to facilitate switching and management of railcars. EnergySolutions has been receiving radioactive soil and debris since 1988 and receives over 70 percent of this material by rail due to the significant safety and cost advantages of rail transportation.

At the disposal facility, the railcars are emptied in a state-of-the-art railcar rotary dumping facility. The containers are opened, sampled, and then loaded onto large dump trucks and transported to the disposal embankment. The soil and debris are emptied from the dump truck onto the disposal embankment and then compacted with heavy equipment to meet compaction requirements.

EnergySolutions is an internationally recognized nuclear waste management services company that has built its reputation on the safe and compliant cleanup of several commercial and government sites. Our safety and compliance record is the foundation of the past, current, and future success of our company.



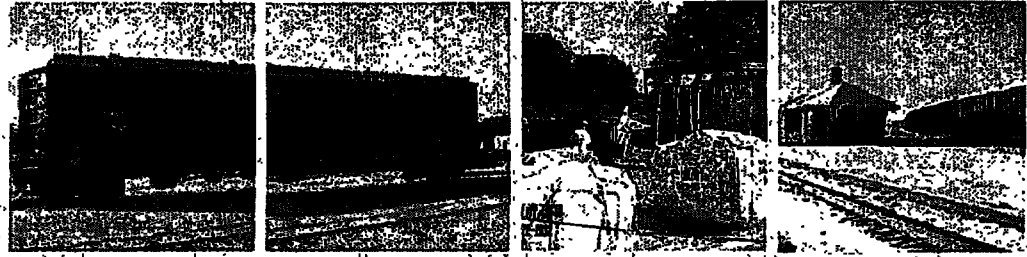
Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed On: August 24, 2010

A handwritten signature in cursive script that reads "Bret Rogers".

Bret Rogers
Sr. Vice President
Technical Services

EXHIBIT 2



Protecting the public and the environment is our top priority.

Enhancing Safety through Rail Shipments

Transporting low-hazard waste from Los Alamos National Laboratory

A key part of the mission at Los Alamos National Laboratory (LANL) is to protect the public and the environment. Past operations at Los Alamos left a legacy of radioactive and hazardous waste contamination. As part of the cleanup process, some low-level radioactive and hazardous waste must be shipped from Los Alamos to disposal sites in other states—sites designed and regulated for final disposal.

Until late 2009, all hazardous and low-level radioactive waste shipments from LANL were transported by truck.

A safer way

To improve safety and increase efficiency, LANL prefers to use rail cars when shipping to the EnergySolutions (ES) licensed disposal facility in Utah. For this first shipping campaign, using rail may eliminate as many as 765,000 highway miles, taking the equivalent of 850 truck trips off of roadways. The success of this campaign could lead to additional shipments. The campaign is expected to take about three months. Truck shipments began on November 30, 2009; rail transfers began on December 1, 2009.

Los Alamos does not have a rail spur so the packaged material is shipped by truck approximately 100 miles north to a dedicated industrial facility near Antonito, Colorado, called a "transload" facility. There, the packaged material is loaded into rail cars.

Safe Transportation of LANL Waste

Transporting low-hazard wastes by a combination of truck and truck/rail from LANL cleanup sites to licensed, out-of-state disposal facilities is safer and more efficient than transportation by truck alone.

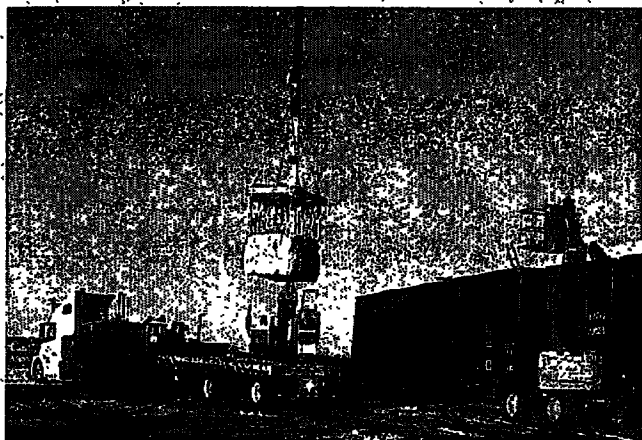
We will:

- Meet all state and federal requirements for truck and rail shipments
- Certify the contents of each shipment
- Inspect each shipment before it leaves the Laboratory and again before the rail shipment leaves the transload facility
- Reduce the number of truck miles required by 90%

The cargo

In most cases, the material being shipped consists of large, water-resistant bags (certified, IP-1 Soft-Sided Shipping Containers) filled with soil and small debris from a LANL disposal area. A small number of metal "intermodal" containers will be used for larger debris. Each truck can carry three bags or one intermodal. The material must be disposed of properly because it contains either very low levels of radioactive material and/or chemicals called polychlorinated biphenyls (PCBs).

The material will contain such low levels of radioactive material and/or PCBs that U.S. Department of Transportation (DOT) regulation of the shipments will not be required.



The material will not cause a fire and cannot explode. No liquids or gasses will be shipped by truck or rail—only debris such as soil, wood, concrete, asphalt, and metal, all of which can be easily retrieved by LANL, its subcontractors, or the rail carrier (with LANL technical support) in the event of an accident. All waste shipping will be conducted in strict compliance with applicable state and federal requirements.

About 15,000 cubic yards will be shipped in this campaign—that's equal to the area of a football field, about seven feet deep.

Loading for train shipment

Once a truck shipment arrives at the dedicated ES transload facility, a crane lifts the containers from the

truck into high-sided rail cars. Each rail car can carry up to 13 bags. The cars have fiberglass lids that are bolted on to prevent rain or snow from entering. The containers are transferred directly from the trucks to the rail car and are at no point staged directly on the ground.

From the rail spur, the San Luis and Rio Grande (SLRG) railroad will transport the loaded cars to Walsenburg, Colorado, where the rail cars will be joined with the Union Pacific (UP) railroad. The UP railroad will go north to Cheyenne, Wyoming, then West along the UP main line to the ES disposal facility at Clive, Utah. The rail route is about 890 miles.

Documentation, Tracking, and Security

All shipment data including individual container numbers, weights and radiological data for each loaded railcar is collected and transmitted to the ES rail transportation coordinator. The rail transportation coordinator will schedule shipment of the loaded railcars, and prepare, distribute, and otherwise manage the bills of lading for the rail shipments.

The rail facility near Antonito has a fenced area with a security gate. Trailers with containers that have not been transferred to rail cars will be kept under physical surveillance at all times.

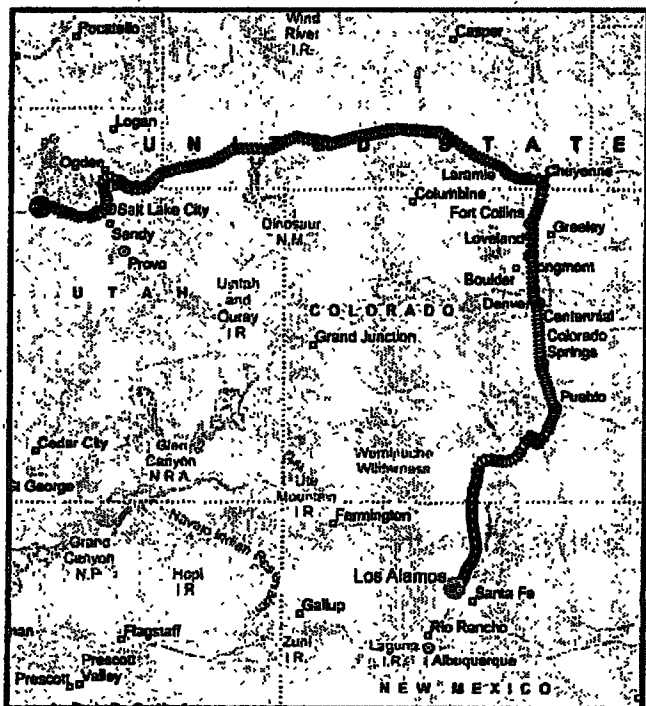
For more information, contact:

Outreach Project Leader

Phone: (505) 667-0216

E-mail: envoutreach@lanl.gov

Web: <http://www.lanl.gov/environment/index.shtml>



Applicable regulations and official documents:

- 49 CFR Parts 171-180
- 49 CFR Subpart G – Emergency Response Information
- Nuclear Regulatory Commission 540/541 Uniform Low Level Radioactive Waste Manifests
- *Supplement Analysis for the Proposed Transport of Low Level Radioactive Waste by Truck and Rail from Los Alamos National Laboratory (LANL) for Disposal at Energy Solutions in Clive, Utah (DOE/EIS-0380-SA-1)*

Detailed Information for Stakeholders and Emergency Responders

Background

ES will transport approximately 15,000 cubic yards of solid soil/debris waste from excavation sites at LANL Technical Area 39 (TA-39) and Upper Los Alamos Canyon. Approximately 10,000 cubic yards will be low-level waste (LLW) and approximately 5,000 cubic yards will be waste containing small amounts of PCBs.

The waste materials currently scheduled for shipment through Antonito contain such low levels of contamination that the DOT does not consider the materials radioactive under 49 CFR Parts 171-180 regulations. However, these waste shipments are regulated as Class 9 material by the DOT because of the presence of PCBs. Class 9 materials are the lowest hazard class of materials transported in the United States.

The materials will be shipped by truck from the excavation site to a temporary transfer/staging area, then trucked to a rail transload facility located near Antonito, where they will be loaded into ES provided high-sided Gondola rail cars for subsequent rail transport to the ES disposal facility at Clive.

Three Stage Process

The following three stage process will be used for waste transportation operation.

Stage 1 – The majority of waste will be packaged in IP-1 soft-sided containers and loaded on commercial flat bed trucks. Some of the waste, primarily larger debris items, may be packaged in intermodal containers. Once loaded for transport at TA-39, the containers and trucks will be monitored for radiation to ensure compliance with the DOT regulations in 49 CFR 173.441.

DOT shipping papers, including bills of lading or waste manifests, as well as Nuclear Regulatory Commission 540/541 Uniform Low Level Radioactive Waste Manifests, will be prepared by Los Alamos National Security (LANS) transportation personnel, with technical support from ES. Once approved for shipping by LANS, ES or Hittman Transport-assigned "shuttle

drivers" will transport the loaded trailers to the vehicle transfer/staging area on NM Highway 4, less than three miles from the LANL TA-39 excavation site.

Stage 2 – Long-haul Hittman drivers will pick up loaded trailers staged at the drop-and-swap yard and transport them approximately 100 miles to the ES transload facility located south of Antonito and return with emptied trailers for subsequent reloading. Or, as project efficiencies allow, Hittman drivers with appropriate security clearances may pick up loaded trailers at TA-39, and transport them directly to Antonito, bypassing the Highway 4 drop-and-swap step.

Stage 3 – Full waste containers will be unloaded from the trucks and loaded into high-sided Gondola rail cars for the final shipping leg via rail to the ES disposal facility at Clive. Depending on the IP-1's loaded weight, we anticipate two to three IP-1s will be shipped via highway to the transload facility using a standard commercial over-the-road flatbed truck. The weight capacity of the truck will be optimized to reduce transportation costs for the project.

It is planned that up to eight commercial tractor trailer trucks will be utilized in "exclusive use" service, with each truck making two round trips daily, totaling sixteen truck shipments per day to the Antonito transload facility. This equates to approximately 48 bags that will be loaded into two to four rail cars per day.

ES will supply a fleet of high-sided Gondola rail cars, each equipped with a custom designed, securing lid structure. These rail cars each have a capacity of 6,275 cubic feet and a maximum net load capacity of 100 tons.

Packaging of Materials for Transport

The majority of the waste materials will be packaged and transported in IP-1 certified soft-sided containers. These containers are a double sided, flexible 242 cubic feet capacity (8.9 cubic yards) fabric bag, with a capacity of 24,000 pounds each. The containers are made of a very strong woven and coated polypropylene fabric material.

This bulk packaging system meets the DOT package specification requirements for an IP-1 shipping container in 49 CFR 173.410 and 173.411. The DOE has used this same packaging configuration at several other site locations within the complex, such as the Separation Process Research Unit Project, West Valley Demonstration Project, and the Mound Closure Project.

A crane or fork truck with sufficient capacity to safely lift and transfer the loaded IP-1 containers, and equipped with a specially designed Lift-Pac bag lifting frame, will be used to transfer the loaded IP-1 containers to flatbed trailers.

Radiological surveys of the loaded containers will be performed and documented, and provided to LANS transportation personnel for preparation of DOT shipping papers. Once the weights and documentation have been received, the IP-1s will be loaded onto a flatbed truck trailer ensuring the load does not exceed the weight limits (local, state, or federal) and is properly secured per the DOT Federal Motor Carrier Safety Regulations regulations in 49 CFR 393 Sub Part I. The secured load will be inspected by the LANS Shipper, who will execute the shipping papers and release the load from the excavation site for transport to disposal.

In addition to the use of the IP-1 soft-sided containers for the majority of the waste, some of the waste will be containerized in 32 cubic yard IP-1 metal freight containers (intermodals). The intermodals will be used primarily for "over sized" waste or large and jagged debris items that could puncture the IP-1 soft-sided containers. These metal containers also meet the requirements of IP-1 container in 49 CFR 173.411.

The metal intermodals will be loaded with less than 20 tons of waste. The containers have a removable steel lid that secures in place. The dump doors have a waterproof gasket and a self-locking sealing mechanism.

Self-loading tractor trailer "roll on roll off" (roll-off) rigs may be used to self-load and haul these intermodal containers in lieu of loading them on the flat bed trailers. The intermodals may be hauled by roll-off truck from the excavation site to Antonito for trans-loading to rail, or direct to Clive. At the transload facility the containers will be loaded onto an



Articulated Bulk Container railcar using a crane. We anticipate eight intermodals to be shipped per railcar and approximately 60 intermodals over the course of the campaign.

Transload Facility

Once the flat bed tractor trailer truck arrives at the transload facility, the project personnel will offload the IP-1 containers using a mobile crane, lifting frame and rigging equipment. The IP-1s will be loaded into the Gondola cars under the direction of the ES Person in Charge (PIC).

Project personnel will remove the Gondola lid using an appropriate lifting device (e.g. crane or extended boom fork lift). Prior to loading IP-1s, the PIC makes the determination to place absorbent material (kitty litter, quick-sorb, etc), as needed, to address potential condensation, precipitation, or potential free liquid accumulation concerns. The crane selected for lifting the IP-1s is positioned in preparation for loading the railcar allowing for adequate swing radius to prevent numerous crane movements.

The transload facility is located on a private rail spur south of Antonito. ES has secured a 920-foot long siding at this location. This facility is an excellent location for these major reasons:

1. It is located approximately one-quarter mile from the nearest residents and three quarters of a mile from the nearest community.
2. It is also located in an industrial area close to the end of the rail line.
3. The location is easily accessible by truck, just off US Highway 285.

4. It is located on the SLRG rail line which offers daily rail service from Antonito to the UP rail yard in Walsenburg, from which the loaded railcars are interlined on the UP Railroad and transported the final leg to Clive.
5. The rail spur at the transload location has the capacity for storage of ten or more Gondola cars.
6. The selected location is also supported by a double track rail line which allows for the placement of over 30 rail cars to use as a "surge capacity" once operations commence. This "surge capacity" will allow ES to stay ahead of the production curve and to ensure an adequate supply of rail cars is always on hand.

Rail Shipment Execution

A full time ES Point of Contact (POC) located at the transload facility will determine, direct, and document which containers are transferred to which railcar. A radiological survey will be performed on each loaded railcar as necessary prior to shipment. The POC or designee will then assemble all shipment data including individual IP-1 bag numbers, weights and radiological data for the loaded railcar and, transmit the data to the ES rail transportation coordinator. The rail transportation coordinator will schedule shipment of the loaded railcars, and prepare, distribute, and otherwise manage the bills of lading for the rail shipments and coordinate with the railroads.

The POC or designee will perform an in depth pre-transport inspection of the loaded railcar prior to shipment, in accordance with 49 CFR 173.24. Each loaded railcar will be inspected for signs of damage caused during loading operations. Railcar covers will be inspected to prevent water infiltration or the potential release of material from the railcar, and to ensure compliant markings, labels and placards.

Based on previous experience, ES expects the transit time for the rail transportation from the Antonito transload site to the ES disposal facility at Clive to be approximately 7 to 10 days.

From the transload location south of Antonito the SLRG railroad will transport the loaded cars to Walsenburg, where the rail cars will be interlined

with the UP railroad. The UP railroad will follow a route North through the state of Colorado and into Cheyenne, Wyoming then West along the UP main line to the ES disposal facility at Clive.

The rail route is approximately 890 miles. Turn around time for the rail cars is approximately 24 days. The SLRG will provide daily rail service at the transload facility.

Inclement Weather

ES will ensure that acceptable weather conditions exist prior to the dispatch and during the approximate two to three hour transit time from the LANL North Ancho Canyon Project and the LA Canyon excavation sites or the drop-and-swap yard to the Antonito transload facility. No transport vehicle will be dispatched from any of the phased transport sites when severe weather conditions or adverse road conditions exist or are forecasted along the highway route.

Emergency Response and Contingency Action Plan – EnergySolutions FS-SW-CP-001 Rev. 0

Off normal transportation incidents and events may include, but are not limited to vehicle accidents and waste container integrity failures. Events occurring during any phase of waste transportation between the LANL TA-39 excavation site and the ES Clive disposal facility shall be reported per the following:

Event Notification:

1. LANS Notification - LANS Emergency Response Office (505) 667-6211
The LANS 24 hour - seven day (24-7) per week Emergency Response Office will be noted on the manifests and bills of lading to be called in case of any transportation emergency en-route. The LANS Emergency Response Office will make a decision whether or not to deploy the Accident Response Group, whose capabilities are:
 - Deploy Environment, Safety and Health support
 - Provide forward operations, radiological and industrial hygiene support including surveys and specialized instrumentation

2. ES Notification - ES project Person in Charge (PIC), Jose Jerez, office phone (505) 663-7214, cell phone (801) 243-3506
 - PIC will utilize ES First Notification process.
 - PIC will also make decision if ES will send Radiological Control Technicians to site, in addition to the radiological technicians sent by LANS (if required).
3. LANS Transportation - Tamer Amin (505) 665-8681 or cell (505) 231-2824
4. Written report submitted to the LANS Emergency Response Office and Transportation within 24 hours.

The highway transport phase shall include the route from the LANL TA-39 work site to the ES Antonito rail transfer station, including load transfers and/or staging that may occur at the NM Highway 4 "drop-and-swap" area near TA-39. Waste loads shall remain attended at all times during highway transport, including staging at the Highway 4 yard.

Highway Transportation Phase:

Events which occur during the highway transport phase of the project, shall be managed per the Hittman Transportation, LLC's emergency response plan, in addition to the above listed reporting requirements.

Antonito Truck to Rail Transloading Operation:

ES project staff will establish and maintain emergency response supplies and equipment sufficient to manage a waste material release or spill that could occur during transloading from highway trailer to rail gondola cars. Rad-Worker II and Occupational Safety and Health Administration Hazardous Waste Operations trained project staff and heavy equipment from the TA-39 job site, will be available and/or mobilized to Antonito as needed to respond to a waste material spill. Materials will be maintained to collect and contain any spilled material. Supplies on hand include manufacturer supplied patch kits to repair small breeches to the IP-1 Lift-Pac bags, and *salvage* drums and IP-1 Lift-Pac bags to repackage larger quantities of material, incidental liquids, or other non-conforming items.

Rail Transportation Phase:

Transportation incidents occurring during the rail phase of transport will be managed and reported in accordance with SLRG Railroad and UP Railroad protocols. Events reported by either railroad to the ES rail transportation coordinator, will be reported per the *above* listed requirements.

EXHIBIT 3



**Department of Energy
National Nuclear Security Administration
Washington, DC 20585**



July 9, 2010

**The Honorable John T. Salazar
Member
U.S. House of Representatives
326 Cannon House Office Building
Washington, D.C. 20515**

Re: Shipment of Waste through Conejos County, Colorado

Dear Congressman Salazar:

Secretary Chu has asked me to respond to your May 24 and June 2, 2010, letters in which you expressed concerns regarding shipment by rail of Department of Energy (DOE) wastes through Conejos County, Colorado. In your most recent June 2 letter, you requested that the DOE permanently redirect shipments of these wastes out of Conejos County.

DOE takes very seriously the concerns of members of Congress and the public. In recognition of the concerns of both Conejos County and your office, we understand that EnergySolutions voluntarily suspended the practice of loading DOE waste containers onto rail cars in Conejos County pending the conclusion of further discussions on this matter. To fully understand the concerns you have heard expressed, an explanation of the environmental clean-up effort at the Los Alamos National Laboratory (LANL) may be helpful.

Background

As a commitment to clean-up the contamination from past national security activities at LANL, the DOE entered into a Consent Order with the State of New Mexico in 2005. Many of the required cleanup activities involve the removal of contaminated waste, which is containerized and shipped to a licensed disposal facility in compliance with all applicable laws, regulations, and DOE orders. The pace of these clean-up activities is strictly governed by milestones contained in the 2005 Consent Order and DOE is subject to fines and penalties in the event that those milestones are missed. An internationally recognized firm, EnergySolutions, is under subcontract to LANL to package, transport, and dispose of this contaminated waste.

The subcontract defines the task (e.g. transport and dispose of the waste according to federal, state and local laws) but does not define how the task is to be accomplished. It is the contractor's responsibility (in this case EnergySolutions) to determine the safest



and most efficient approach to accomplishing the task in compliance with all applicable regulatory and permitting requirements.

Chronology

Initial transload activities in Conejos County, near the Town of Antonito, took place in the latter part of 2009. Upon recognition of important community concerns about transloading of containers from trucks to rail cars, EnergySolutions voluntarily suspended its operations until these concerns could be addressed. We are informed that those transloading operations remain suspended. We are further informed that EnergySolutions and the San Luis & Rio Grande Railroad (SLRG) proposed a number of concessions to address the community's concerns while, at all times, working within the parameters of applicable federal, state and local laws and regulations. These steps were memorialized in a May 14, 2010, Agreement-in-Principle. We understand that the Board of County Commissioners rejected that Agreement against the advice of the Conejos County Attorney.

As a result of the suspension of the transloading activities, EnergySolutions has continued the shipments of these waste materials to its Utah disposal site by truck, incurring over 625,000 road miles that otherwise could have been avoided if rail had been used for transportation. Some of the potential transportation routes would involve highways in southwestern Colorado. Restarting transloading operations would eliminate the need for waste being transported over millions of additional highway miles and reduce the associated potential risks to the public.

Waste Characteristics

The containerized waste from LANL that would be transloaded at the Conejos County facility is extremely well characterized, and will only be the lowest classification of low-level radioactive waste (Class A LLW). The EnergySolutions facility can only accept Class A LLW for disposal according to its current operating license and has committed not to ship anything higher than Class A LLW. The majority of these wastes contains small quantities of polychlorinated biphenyls and are routinely handled and transported in an environmentally safe and sound manner. Future wastes would also be Class A LLW and may or may not contain PCBs.

I also note that over seventy percent of the clean-up waste materials shipped from LANL have had such low levels of radioactive contamination that it was below the threshold levels requiring regulation by U.S. Department of Transportation (DOT).

Safety

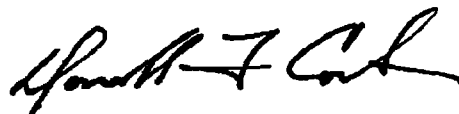
DOE is committed to ensuring that all of its clean-up and disposal operations are performed in the safest possible manner. While truck transportation can be performed safely, our analysis indicates that rail is the safest transportation mode. Statistically, truck transportation involves twenty times more transportation-related incidents (these

are typical vehicular accidents that do not involve radiological releases) when compared to rail incidents for the same per ton-miles; personnel working in the rail industry are more than fifty percent less likely to experience an injury and eighty percent less likely to experience a fatality, than employees in the trucking industry; and truck transportation, based on conservative estimates, uses more than twice the amount of fuel per ton-mile shipped when compared to rail. In addition, we are informed by EnergySolutions that no waste containers are opened during the transload process; rather, sealed and intact containers are transferred by crane from truck to railcar. Although not required, we also understand that EnergySolutions has agreed to place an impermeable liner beneath this transfer point to provide an additional measure of environmental protection.

I appreciate and respect the position you have taken in representing your constituents. We believe that the work to be conducted by EnergySolutions is of benefit to the nation as a whole and will be conducted in a manner that minimizes risk to the citizens of the Conejos County region and beyond.

I remain committed to maintaining the safest approach to DOE clean-up operations, and I am happy to arrange an opportunity for you to meet with DOE subject matter experts. Additionally, I would like to invite you to visit the Los Alamos National Laboratory at your convenience to learn more about its mission and activities. We remain hopeful that, with your help, an amicable solution beneficial to your constituents and protective of the public and the environment may be reached with EnergySolutions and the SLRG.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald L. Cook". The signature is fluid and cursive, with the first name "Donald" being more prominent and the last name "Cook" following in a similar style.

Donald L. Cook
Deputy Administrator
for Defense Programs

EXHIBIT 4

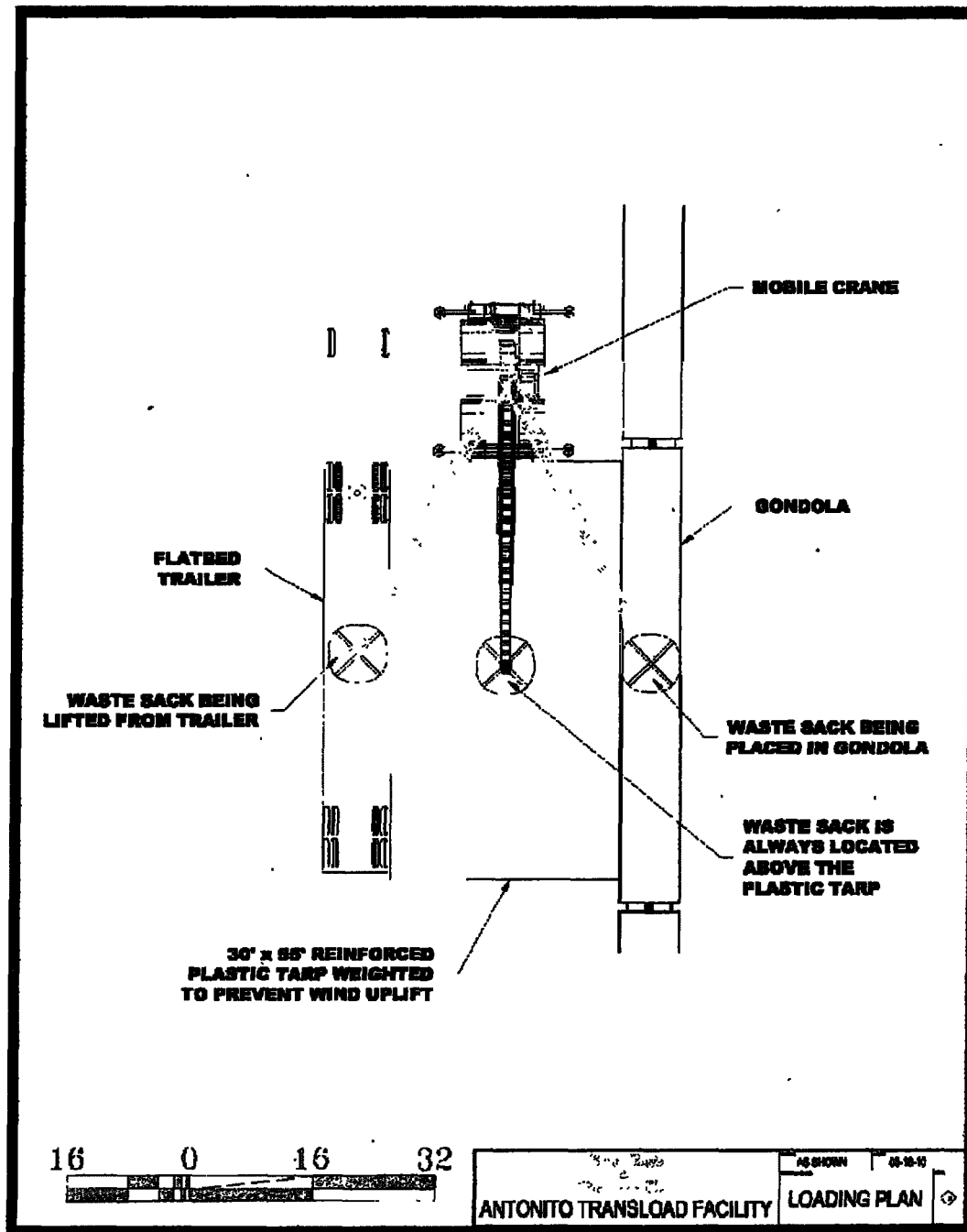
VERIFIED STATEMENT OF MATHEW W. ABBEY

My name is Mathew W Abbey. I am General Manager of the San Luis and Rio Grande Railroad (SLRG). The SLRG is a wholly-owned subsidiary of Permian Basin Railways (PBR). PBR is a wholly-owned subsidiary of Iowa Pacific Railway Holdings LLC (IPH). When I refer to the Railroad in this statement I am referring to the SLRG.

1. I am submitting this verified statement in support of the SLRG's petition for a declaratory order that the SLRG's Antonito Transload Facility ("Facility") meets the requirements for 49 U.S.C. § 10501(b) preemption and that the Facility is not subject to the County's land use code because the proposed activities are transportation performed under the auspices of a rail carrier.
2. The SLRG is based in Alamosa, Colorado with 149 miles of right of way extending East to Walsenburg, CO, South to Antonito, CO and West to South Fork, CO. I am responsible for the day-to-day operation of the SLRG including safety, freight and passenger operations, maintenance, local HR, local marketing, and other tasks typically delegated to local management of a small business operating unit.
3. SLRG offers transloading services bundled as part of its rail transportation services. The Facility, constructed by SLRG at its sole cost and expense, and wholly owned and operated by the SLRG, is located in Conejos County, CO. SLRG has the exclusive right to market the Facility and to contract with shippers to provide transloading services at the Facility. SLRG has exclusive authority to set rates and charge for use of the Facility, including transloading services. No other party invoices for, collects or receives any fee for the use of the Facility or its services.
4. The SLRG Facility opened in November 2009. Since that time the Facility has handled Class 7 and 9 hazardous material, transloaded as described in this document. For more than a century prior to November 2009, this site was in use as a rail facility for the transloading of mining and agricultural products. Lava rock was the most recent product transloaded at that site. Lava transload continues immediately adjacent to SLRG's Facility. A photograph of the site is annexed hereto as Exhibit C.

VERIFIED STATEMENT OF MATHEW W ABBEY EXHIBIT B

SLRG ANTONITO TRANSLOAD FACILITY LOADING PLAN DIAGRAM



VERIFIED STATEMENT OF MATHEW W ABBEY EXHIBIT C
MAP OF SLRG ANTONITO TRANSLOAD FACILITY

ANTONITO, CO

SLRG YARD AREA

CUMBRES TOLTEC RR
LOCOMOTIVE SHOPS

HOPPER CAR CLEANOUT
PIT

CO LAVA BULK LOADING
FACILITY

TRANSLOAD SITE IN
QUESTION

DICAPERL MILL AND BULK
LOAD FACILITY

HARBORLITE MILL AND BULK
LOAD FACILITY

Image courtesy of Farm Service Agency

© 2010 Google

GOO

5. In addition to transloading services, SLRG provides freight car storage and running repairs (as required) at the site.

6. SLRG is the legally responsible party for the movement of rail shipments into and out of the Facility, as well as the transloading of shipments within the Facility. SLRG inspects and maintains all transportation equipment within the Facility, including the maintenance and repair of tracks, ballast, crossties, switches and fixed infrastructure other than that identified below.

7. The Facility is operated under the auspices of the SLRG pursuant to a contract between SLRG and Alcon Construction, Inc. (Alcon), a third party contractor, to perform the physical transloading operations at the Facility. Alcon, which neither owns nor leases the Facility, would serve as SLRG's agent for purposes of performing transloading services at the Facility. A copy of SLRG's contract with Alcon is annexed hereto as Exhibit A.

8. SLRG directly compensates Alcon for its transloading services. Under its contract with SLRG, Alcon does not pay any fee, lease, compensation, or consideration for the use of the Facility; nor may Alcon conduct any independent business at the Facility. Alcon has no authority to market the Facility.

9. With regard to operations, Alcon takes its scheduling and operational direction from the SLRG. Upon being informed by SLRG of the Railroad's transload requirements, Alcon staffs the Facility with Alcon employees, none of whom are employees of SLRG. Alcon is contractually obligated to SLRG to provide the specialized equipment necessary for the transloading process, such as boom trucks or cranes.

10. The shipper communicates operational directions such as loads, dates, and times to the SLRG which, in turn, communicates the necessary information to Alcon. Alcon does not and cannot take operational direction from the shipper. A typical day at the facility operates as follows:

a. The shipper/customer, through standard railroad way billing procedures, orders empty gondola cars to be spotted at the site.

b. SLRG delivers the empties, and picks up any loads that have been released for transport.

c. When the request is made for the empty gondolas, SLRG contacts Alcon and communicates the delivery schedule to Alcon, along with information about how many trucks are expected.

d. When the truck shipments are complete for the day, Alcon attaches the lids to the gondolas and communicates their total loads to SLRG.

e. Based on the number of truck shipments made, and through communication with SLRG, the shipper releases the correct number of cars for transport.

A diagram of the operation is attached at Exhibit B.

11. SLRG retains ultimate responsibility to control, monitor and supervise the operation of the Facility. SLRG exercises oversight of its contractor, Alcon. Except as set forth elsewhere herein, SLRG is responsible for safety, environmental, security and operational aspects of the Facility. Alcon is not authorized to improve, change or modify any physical aspect of the Facility without SLRG authority. Those improvements authorized by SLRG are performed by Alcon under SLRG supervision.

12. Alcon access to the Facility is controlled by SLRG. No Alcon employee, representative, sub-contractor, licensee, or invitee may access the Facility without SLRG authorization and approval.

13. SLRG controls Shipper ingress to and egress from the Facility. Upon arrival at the Facility gate, the Shipper's trucks are checked in and inspected by SLRG. After inspection, SLRG directs the Shipper's drivers to spot the trucks in the yard adjacent to the transloading equipment. Alcon employees operate the transloading equipment.

14. None of the activities proscribed by the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007) including collecting, storing or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting and shredding) is to occur.

15. The shipment, which remains at all times in its original sealed shipping container, is transloaded from the truck bed onto a specially-constructed FRA and AAR approved gondola owned by the Shipper.

16. SLRG, and not Alcon, is contractually liable to the Shipper for damage to the shipment during loading. Once the containers are lifted from the trucks to the rail cars, Alcon's duties are complete. Alcon is not involved in releasing rail cars for transport.

17. Alcon logs its daily activities and invoices the SLRG directly for their work.

18. Alcon exercises no supervisory control over SLRG employees.

19. SLRG at its sole expense provides Alcon employees with safety and rules training relevant to the transloading activities, including but not limited to Basic Railroad Safety Training. Conversely, Alcon provides no training to SLRG employees.

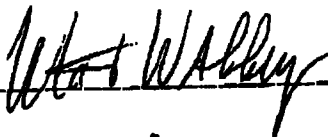
FROM

(FRI) AUG 20 2010 16:15/ST. 16:13/No. 6801363887 P 6

VERIFICATION

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: August 20, 2010.


[signature]

VERIFIED STATEMENT OF MATHEW W ABBEY EXHIBIT A

SLRG CONTRACT WITH ALCON FOR THE ANTONITO TRANSLOAD FACILITY

AGREEMENT FOR TRANSLOADING SERVICES

This Agreement dated Feb 18 is made by and between the San Luis & Rio Grande Railroad ("SLRG" or "the Railroad"), a Colorado corporation, and Alcon Construction, Inc. ("Alcon"), a Colorado corporation.

WHEREAS, EnergySolutions has entered into a transportation agreement under the provisions of 49 U.S.C. Section 10709 dated November 1, 2009 and identified as #UPCQ 95614 with the Union Pacific Railroad Company ("UP") for the transportation of waste in sealed packages compliant and in accordance with U.S. Department of Transportation regulations;

WHEREAS, under the terms of UPCQ 95614 and Cooperative Marketing Agreement between SLRG and UP, rail transportation for this cargo will be provided by SLRG and UP from Antonito, CO to Clive, UT via the interchange of Walsenburg, CO pursuant to shipping instructions provided by Energy Solutions;

WHEREAS, EnergySolutions will enter into a separate agreement under the provisions of 49 U.S.C. 10709 with SLRG for local transportation services that the Railroad will perform to the extent not covered in the EnergySolutions/UP agreement referenced above;

WHEREAS, pursuant to UPCQ 95614 EnergySolutions will pay UP for all transportation charges incurred in this move except for those local services provided by SLRG;

WHEREAS, because the origin of the cargo is not located on a rail line, the sealed packages will be transported by truck from the origin to a facility ("the Transload Facility") at Antonito that SLRG will construct on its land where SLRG will transload the sealed packages into rail cars for further movement in interstate commerce;

AND WHEREAS, SLRG shall provide and EnergySolutions shall compensate SLRG for those local transportation services including but, not limited to, switching, transferring of cargo between trucks and rail cars at the Transload Facility, weighing, and demurrage as provided in the EnergySolutions/SLRG agreement;

2.

The parties agree as follows:

1. SLRG will as part of its common carrier obligation provide all transportation services in connection with the transfer of cargo from truck to rail at SLRG's Transload Facility at Antonito including the direct unloading of sealed inbound packages from truck onto waiting rail cars or the unloading and temporary storage of inbound containers before placing them on rail cars for outbound movement, direct the movement of loaded inbound trucks into and the movement of outbound empty trucks out of the Transload Facility, the switching, servicing, , and storage of empty or loaded rail cars, and such servicing of rail cars and equipment as may be required;
2. In its sole discretion, SLRG subcontracts to Alcon such functions as the movement and unloading of sealed containers from trucks onto rail cars or into temporary storage;
3. Alcon's role at the Transload Facility will be limited to monitoring the arrival of loaded and the departure of empty trucks, directing the movement of trucks at that facility, and completing as SLRG's agent any paper work required by the truckers;
4. Alcon will have no relationship, financial or otherwise, with EnergySolutions or any other customers to be served at the Transload Facility or SLRG;
5. Alcon will have no right to market to shippers or third parties the services it will provide at the Transload Facility;
6. EnergySolutions or other shippers, truckers handling cargo on their behalf, or SLRG, as the case may be, will provide Alcon with bills of lading or other documents or information necessary to advise it of the flow of inbound traffic;
7. In selecting Alcon as its subcontractor, SLRG will compensate Alcon for its services in accordance with the procedures and schedule attached to this agreement as Exhibit A;
8. In selecting Alcon as its subcontractor, SLRG engages Alcon to work as its agent and under its sole direction;
9. SLRG will be solely responsible for all costs, liabilities, and expenses associated with the Transload Facility including maintenance, repair, operation, and taxes related thereto;
10. SLRG will be solely responsible for any loss or damage to cargo during the movement through and during the loading and

unloading process at the Transload Facility and during the portion of the rail movement over SLRG's line;

11. SLRG will be solely responsible for the marketing of services provided by or at the Transload Facility;
12. SLRG shall have total control over the Transload Facility including access to the facility for any purpose and responsibility for safety and security and compliance with local laws, to the extent applicable;
13. The term of this Agreement shall be two years but SLRG may at its sole discretion and without cause terminate the transload services provided at the Transload Facility by Alcon as its agent upon 30 days' written notice and may provide those services directly or through another agent or subcontractor at its sole discretion;
14. SLRG shall defend, indemnify, and hold Alcon harmless for all costs, liabilities, and expenses it incurs in providing transload services at the Transload Facility regardless of cause or fault.

Agreed to:

San Luis & Rio Grande Railroad

Alcon Construction, Inc.

By: 

Title

V.P. Smith

By: 

Title President

EXHIBIT 5

CLEAN RRS ACT OF 2007 (DIED IN COMMITTEE)
STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS --
(Senate - February 28, 2007)

— S 2371]

By Mr. LAUTENBERG (for himself, Mr. **MENENDEZ**, Mr. **KENNEDY**, and Mr. **REED**):

S. 719. A bill to amend section 10501 of title 49, United States Code, to exclude solid waste disposal from the jurisdiction of the Surface Transportation Board; to the Committee on Commerce, Science, and Transportation.

Mr. LAUTENBERG. Mr. President, I rise today to re-introduce legislation that will close an egregious loophole in federal law. Currently, this loophole permits solid waste management facilities operated near railroads to go unregulated--free from meeting any minimum level of safety, health, and environmental standards. Basically, this loophole prevents state or local law from regulating the operation of these facilities on property owned or controlled by railroads.

In fact, just last week, a United States District Court judge declared this loophole alive and well. By shutting down the State of New Jersey's efforts to regulate solid waste rail facilities, this ruling allows the continuing proliferation of these unregulated facilities--which are already spreading quickly throughout the Northeast United States.

These unregulated facilities present an imminent threat to public health and the environment. My bill, the Clean Railroads Act of 2007, will close this loophole once and for all. Almost 2 years ago, I first introduced legislation to address this problem, and I renew that effort today.

This problem could easily be solved by proper interpretation of current federal law. Such an interpretation could be made by the federal Surface Transportation Board (STB), an independent board charged with economic regulation of railroads. However, despite several opportunities, the STB has chosen not to define a clear position on this issue. I have urged the Board members to address this problem, as the loophole in federal law has allowed even more of these unregulated facilities to operate.

Last week's court ruling has highlighted the need to find a solution to this problem immediately, and my bill would do just that.

* Let me be clear that my concern is not the transport of solid waste by rail. Railroads provide a vital role in commerce in the United States and the benefits of rail transportation are numerous, as we in New Jersey know. Further, the transportation of waste via rail is not at issue here, and I am not opposed to the operation of solid waste management facilities on property owned or controlled by railroads.

* My chief concern is the lawful management of solid waste facilities. If a solid waste management facility is to be operated on rail property, it must be regulated like any other such facility. That is not happening today.

The threats posed by unregulated waste management facilities operating on property owned or controlled by railroads are so great that a broad and diverse coalition of public and private sector entities have been formed to oppose these rogue operations. I thank these coalition members for their continued efforts, and will be looking forward to the day in which their fears over this issue can be permanently assuaged.

Responsible management of solid waste requires safeguards to protect public health and the environment. As Chairman of the Commerce Committee's Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security, which has jurisdiction over railroads and the Surface Transportation Board, I will work to ensure this loophole does not continue to let the hazards of unregulated solid waste rail facilities affect the lives of New Jerseyans and other Americans.

I ask unanimous consent that the text of the bill be printed in the **RECORD**.

There being no objection, the text of the bill was ordered to be printed in the **RECORD**, as follows:

S. 719

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ``Clean Railroads Act of 2007''.

[Page: S2372]

SEC. 2. AMENDMENTS TO EXCLUDE SOLID WASTE FACILITIES FROM THE JURISDICTION OF THE BOARD.

Section 10501 of title 49, United States Code, is amended--

(1) by striking ``facilities," in subsection (b)(2) and inserting ``facilities (except solid waste management facilities (as defined in section 1004 of the Solid Waste Disposal Act (42 U.S.C. 6903))),"; and

(2) by striking ``over mass transportation provided by a local governmental authority." in subsection (c)(2) and inserting ``over--

``(A) mass transportation provided by a local governmental authority; or

``(B) the processing or sorting of solid waste.".

END